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HOW CHEE HONG v. PP

HIGH COURT MALAYA, KUALA LUMPUR
ASLAM ZAINUDDIN JC
[CRIMINAL APPEAL NO: WA-42[ORS]-10-05-2019]
6 JANUARY 2020

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CONSTITUTIONAL LAW: *Autrefois acquit – Principle – Applicability – Accused charged with money laundering offences and criminal breach of trust – Accused subsequently acquitted of predicate offence under s. 409 of Penal Code – Whether prosecution estopped from pursuing money laundering charges under Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 – Whether offence of money laundering and criminal breach of trust two separate and distinct offences – Whether plea of autrefois acquit or double jeopardy applicable*

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CRIMINAL PROCEDURE: *Autrefois acquit – Principle – Applicability – Accused charged with money laundering offences and criminal breach of trust – Accused subsequently acquitted of predicate offence under s. 409 of Penal Code – Whether prosecution estopped from pursuing money laundering charges under Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 – Whether offence of money laundering and criminal breach of trust two separate and distinct offences – Whether plea of autrefois acquit or double jeopardy applicable*

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On 3 March 2016, the appellant was charged in Sessions Court 3 under s. 409 of the Penal Code. Later, on 21 March 2018, the appellant was charged in four different Sessions Court for 90 charges under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('Act 613') which were eventually consolidated to be heard jointly in Sessions Court 6. The said charges were under s. 4(1)(a) of Act 613 prior to the amendment date *vide* Act A1467 which came into operation on 1 September 2014. Prior to that date, the Act was known as the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('AMLATFA'). Subsequently, as the trial for the charge under s. 409 of the Penal Code progressed in Sessions Court 3, the Deputy Public Prosecutor, on 5 March 2019, informed the Sessions Court Judge ('SCJ') that the prosecution did not wish to proceed further against the appellant under s. 254 of the Criminal Procedure Code ('CPC'). The SCJ thereafter acquitted and discharged the appellant on the Penal Code charge. On 15 May 2019, which was supposed to be the beginning of the AMLATFA trial in Sessions Court 6, the defence raised a preliminary issue whether the AMLATFA charges against the appellant could proceed or otherwise, as he was acquitted of the predicate offence in Sessions Court 3 and there was no appeal filed by the Public Prosecutor. The SCJ dismissed the preliminary issue raised by the defence.

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Hence, this appeal to the High Court. It was the appellant's contention that the AMLATFA charges could not proceed because the matter was already *autrefois acquit* and to save the court's time, he should be acquitted and discharged of the 90 charges preferred against him.

Held (dismissing application):

(1) In order to sustain a conviction under s. 409 of the Penal Code, two ingredients are to be proved: namely (i) the accused was an agent entrusted with the property of which he was duty bound to account for; and (ii) the accused had committed criminal breach of trust. It could clearly be seen that the offence of money laundering and criminal breach of trust are two separate and distinct offences. Therefore, the plea of *autrefois acquit* or double jeopardy did not apply in these circumstances. (paras 9, 10 & 15)

(2) The prosecution could not be estopped from pursuing the money laundering charges against the appellant just because he was acquitted on the predicate offence. No doubt the prosecution must prove all the ingredients of the offence under s. 4(1) of the AMLATFA, but they need not prove that there was a conviction for the predicate offence. This was clearly mentioned in s. 4(2) of the AMLATFA as it was then. Presently, it is stated in s. 4(4) of Act 613. It was incorrect to say that just because the appellant was acquitted of the predicate offence, the unlawful activity which constituted a serious offence did not take place. What could not be said was that the accused was the one who committed the offence. This was because he had been acquitted of the same. (para 13)

Case(s) referred to:

Azmi Osman v. PP & Another Appeal [2015] 9 CLJ 845 CA ***(refd)***
PP v. Billion Nova Sdn Bhd & Ors [2016] 2 CLJ 763 CA ***(dist)***
PP v. Dato' Sri Mohd Najib Hj Abd Razak [2019] 6 CLJ 561 FC ***(refd)***
Sadhupati Nageswara Rao AIR 2012 SC 3242 ***(refd)***
Sambasivam v. The Public Prosecutor, Federation Of Malaya [1950] 1 LNS 80 PC ***(refd)***

Legislation referred to:

Anti-Money Laundering and Anti-Terrorism Financing Act 2001, ss. 4(1)(a), (2), (4), 56(1)
Criminal Procedure Code, s. 254
Penal Code, ss. 409, 420

For the appellant - K Kumaraendran & C Vignesh Kumar; M/s Vignesh Kumar & Assocs
For the prosecution - Harris Ong; DPP

Reported by Suhainah Wahiduddin

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JUDGMENT

Aslam Zainuddin JC:

[1] This was an appeal from the decision of the learned Sessions Court Judge in the court below dismissing the application of the appellant praying for an order that the charges under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("Act 613") cannot proceed because of '*autrefois acquit*'. This was because the appellant was acquitted of the predicate offence under s. 409 of the Penal Code ("the Code").

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Background Facts

[2] On 3 March 2016, the appellant was charged in Kuala Lumpur Sessions Court 3 under s. 409 of the Code and an alternative charge under s. 420 of the Code. Later, on 21 March 2018 the appellant was charged in four different Sessions Court in Kuala Lumpur for 90 charges under Act 613 which were eventually consolidated to be heard jointly in Kuala Lumpur Sessions Court 6. The said charges were under s. 4(1)(a) of Act 613 prior to the amendment made *vide* Act A1467 which came into operation on 1 September 2014. Prior to that date, the Act was known as the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ("AMLATFA").

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[3] Subsequently, as the trial for the charge under s. 409 of the Code progressed in Kuala Lumpur Sessions Court 3, on 5 March 2019, the Deputy Public Prosecutor informed the learned Sessions Court Judge that the prosecution does not wish to proceed further against the appellant under s. 254 of the Criminal Procedure Code (CPC). The learned Sessions Court Judge thereafter acquitted and discharged the appellant on the Penal Code charge. On 15 May 2019, which was supposed to be the beginning of the AMLATFA trial in Kuala Lumpur Sessions Court 6, the defence raised a preliminary issue whether the AMLATFA charges against the appellant can proceed or otherwise, as he was acquitted of the predicate offence in Sessions Court 3 and there was no appeal filed by the Public Prosecutor.

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[4] Upon hearing submissions by the defence and prosecution, the learned Sessions Court Judge dismissed the preliminary issue raised by the defence, *id est* that the matter is *autrefois acquit*. Hence, the appeal to the High Court.

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[5] In the High Court, the appellant generally repeated his contention in the court below that the AMLATFA charges cannot proceed because the matter is already *autrefois acquit* and to save the court's time, he should be acquitted and discharged of the 90 charges preferred against him. After hearing both sides, I had no hesitation in dismissing the application. My reasons now follow.

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[6] The ingredients of s. 4(1)(a) of the AMLATFA and s. 409 of the Penal Code.

Section 4(1) AMLATFA states:

> Any person who:
>
> (a) engages in, or attempts to engage in, or
>
> (b) abets the commission of, money laundering, commits an offence and shall on conviction be liable to a fine not exceeding five million ringgit or to imprisonment for a term not exceeding five years or to both.
>
> "Money Laundering" means the act of a person who:
>
> (a) engages directly or indirectly in a transaction that involves proceeds of any unlawful activity;
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> (b) acquires, receives, possesses, disguises transfers, converts, exchanges, carries, disposes, uses, removes from or brings into Malaysia proceeds of any unlawful activity; or
>
> (c) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, right with respect to, or ownership of, proceeds of any unlawful activity.

[7] In the oft-quoted case of *Azmi Osman v. PP & Another Appeal* [2015] 9 CLJ 845, the Court of Appeal held:

> To our mind, what the definition of "money laundering" as provided for under section 3 of the AMLATFA means is this:
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> a person commits an offence of money laundering under the AMLATFA, if he, among others, either directly or indirectly, is concerned in a transaction involving proceeds from any unlawful activity, where from an objective circumstance, he can be concluded to know or has reason to believe, that the proceeds that he is concerned with in the transaction are proceeds from an unlawful activity.
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> It is clear to our mind that the offence as defined under section 3 of the AMLATFA is aimed at any person who knowingly engages in proceeds of an unlawful activity. The offence is concerned with the proceeds of an unlawful activity. In other words, it is a post-predicate offence activity of knowingly dealing with the unholy fruits of an unlawful activity. As such, for such an offence of money laundering to stick on an accused person under section 4(1)(a) of the AMLATFA, it is not necessary that he must first be convicted with the predicate serious offence from which the proceeds were derived. Section 4(2) of the AMLATFA expressly provides for that. That statutory provision is couched in the following terms:
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> A person may be convicted of an offence under sub-section (1) irrespective of whether there is conviction in respect of a serious offence or foreign serious offence.

A His culpability that attracts criminality is premised upon the fact that he is knowingly concerned with the illegal proceeds from the unlawful activity.

[8] Whereas the definition of criminal breach of trust under s. 409 of the Code is as follows:

B (i) The accused must be an agent;

(ii) He must have been entrusted, in such capacity, with property;

(iii) He must have committed breach of trust in respect of such property.

C **[9]** In order to sustain a conviction under s. 409 of the Penal Code, two ingredients are to be proved: namely, (i) the accused, an agent was entrusted with the property of which he is duty bound to account for; (ii) the accused has committed criminal breach of trust. (See the case of *Sadhupati Nageswara Rao* AIR 2012 SC 3242). The above definition is taken from *Ratanlal & Dhirajlal's Law of Crimes,* 28th edn 2018.

D **[10]** Based on the above, it can be clearly seen that the offence of money laundering and criminal breach of trust are two separate and distinct offences. Therefore, with respect to learned counsel for the appellant, I cannot acquiesce to their submission that if the AMLATFA charges were to proceed against their client, it would amount to *autrefois acquit* or double jeopardy.

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[11] Learned counsel had also referred to the case of *PP v. Billion Nova Sdn Bhd & Ors* [2016] 2 CLJ 763 to support their submission that in order to prove an offence of money laundering under s. 4(1) of AMLATFA, the predicate offence must be proved against the appellant. In the case before me, as the appellant has been acquitted of the predicate offence under s. 409 Penal Code, and there was no any appeal filed by the Public Prosecutor, the offence of money laundering must naturally fall as well.

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[12] The case of *PP v. Billion Nova* can be distinguished from the case before me in that the said case was about forfeiture proceedings under s. 56(1) of AMLATFA and not a prosecution under s. 4(1) of the Act. In a forfeiture proceeding, the standard of proof required is only on a balance of probabilities and not proof beyond reasonable doubt. What the Court of Appeal said in the above-mentioned case of *Billion Nova* was simply that for an order of forfeiture of property under s. 56(1) of AMLATFA to be made, the Public Prosecutor must show, on a balance of probabilities, that the property was the subject matter or evidence relating to the commission of an offence under s. 4(1) of AMLATFA.

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[13] Therefore, the prosecution cannot be estopped from pursuing the money laundering charges against the appellant just because he was acquitted on the predicate offence. No doubt the prosecution must prove all the ingredients of the offence under s. 4(1) of AMLATFA but they need not prove that there was a conviction for the predicate offence. This is clearly mentioned in s. 4(2) of AMLATFA as it was then. Presently, it is stated in s. 4(4) of Act 613. It would be incorrect to say that just because the appellant was acquitted of the predicate offence, the unlawful activity which constitutes a serious offence did not take place. What cannot be said is that the accused was the one who committed the offence. This is because he has been acquitted of the same. See the case of *Sambasivam v. PP* [1950] 1 LNS 80; [1950] MLJ 145 (PC) at p. 151 where Lord MacDermott espouses the concept succinctly in his advice.

[14] One other matter which I must touch on is the fact that there was a stay of proceedings granted for the AMLATFA offence by the learned Sessions Court Judge. I set aside the stay order and directed that the trial in the court below to proceed without delay. This is in line with the recent Federal Court judgment in *PP v. Dato' Sri Mohd Najib bin Hj Abd Razak* [2019] 6 CLJ 561 where it was decided by the Federal Court that the determinative principles in considering an application for stay of criminal proceedings are as follows:

> 1. There is a strong public interest in the prosecution of crime and in ensuring that those charged with serious criminal offences are tried.
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> 2. It is undesirable that the criminal process be interrupted or fragmented by interlocutory proceedings. The considerations of public interest are of great weight leaning in favour of expeditious resolution of accusations of crime.
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> 3. The undesirability of fragmenting the criminal process is not confined to any particular part of the criminal process, but rather to the process as a whole. Any interference with any part of the process is antithetical to the proper and just disposition of criminal cases. The caution about the undesirability of fragmentation of criminal process would be more pronounced where a hearing of proceedings has actually commenced.
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> 4. A stay of proceedings application will require especially compelling justification in a case qualifying for urgent judicial decision. For instance, it is important that anyone charged with serious criminal offences be brought to trial expeditiously. Public interest would not be served by allowing the defence to request for a delay. An accused of serious criminal offences who is not guilty should have the opportunity of clearing his name without excessive delay.
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> 5. **A stay of proceedings will not normally be granted pending an interlocutory appeal in a criminal trial. It is only in very exceptional or unusual circumstances that a stay order is granted.** This is so even if the issuing of the interlocutory appeal is not opposed by the prosecution or in fact supported by both the prosecution and the defence.

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6. The accused's rights over preliminary or interlocutory rulings made by the trial Judge are best vindicated by appeal after conviction, if any. *It is generally more desirable to consider preliminary or interlocutory rulings made by the trial Judge in appeal after conviction upon full trial with the benefit of a concrete factual setting then considering them in the abstract during interlocutory appeal.*

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7. The fact that an accused will be put to the expense of a trial is irrelevant and would not qualify as "exceptional circumstances" to justify a stay of a criminal trial pending resolution of an appeal. (emphasis added)

[15] Based on the matters adumbrated above, it is clear that the offences of criminal breach of trust under s. 409 of the Code and money laundering under s. 4(1)(a) of AMLATFA are separate and distinct offences. Therefore, the plea of *autrefois acquit* or double jeopardy does not apply in these circumstances.

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Cadit quaestio.

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